

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INSTALLATION SOFTWARE
TECHNOLOGIES, INC. d/b/a
INSTALLSHIELD SOFTWARE
CORPORATION,

Plaintiff,

v.

WISE SOLUTIONS, INC.,

Defendant.

Civil Action No. 03 C 4502

Hon. David H. Coar
Presiding Judge
Hon. Morton Denlow
Magistrate Judge

FILED
DEC 8 2003
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT
EAST DISTRICT COURT

NOTICE OF MOTION

TO: Michael J. Abernathy
Scott M. Mendel
Lisa A. Carroll
Christopher I. Cedillo
Bell Boyd & Lloyd LLC
Three First National Plaza
Suite 3300
Chicago, IL 60602

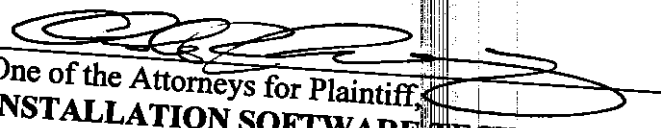
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CLERK
DISTRICT COURT

PLEASE TAKE NOTICE that on December 15, 2003 at 9:00 a.m., or as soon thereafter as counsel may be heard, we shall appear before the Honorable Judge David H. Coar, or any judge sitting in his place or stead, in the courtroom usually occupied by him, Room 1419, Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois, and then and there present Plaintiff's Motion for Leave to File a First Amended Complaint, a copy of which is attached.


One of the Attorneys for Plaintiff,
INSTALLATION SOFTWARE TECHNOLOGIES,
INC. d/b/a INSTALLSHIELD SOFTWARE
CORPORATION

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CERTIFICATE OF SERVICE

I, Charles R. Topping, an attorney of record in the above-captioned action, certify that on December 8, 2003, a true and correct copy of the foregoing Motion for Leave to File a First Amended Complaint was served via hand delivery, upon:

Michael J. Abernathy
Scott M. Mendel
Lisa A. Carroll
Christopher I. Cedillo
BELL, BOYD & LLOYD LLC
Three First National Plaza
70 West Madison Avenue, Suite 3300
Chicago, Illinois 60602


Charles R. Topping

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INSTALLATION SOFTWARE TECHNOLOGIES,
INC. d/b/a INSTALLSHIELD SOFTWARE
CORPORATION,

Plaintiff,

v.

WISE SOLUTIONS, INC.,

Defendant.

No. 03 C 4502

Hon. David H. C.
Presiding Judge

Hon. Morton Denlow
Magistrate Judge

**PLAINTIFF'S MOTION FOR LEAVE TO
FILE FIRST AMENDED COMPLAINT**

DEC 17 2003

Plaintiff, INSTALLATION SOFTWARE TECHNOLOGIES, INC., d/b/a
INSTALLSHIELD SOFTWARE CORPORATION ("InstallShield"), respectfully moves this
Court, pursuant to Federal Rule of Civil Procedure 15(a) for leave to file its First Amended
Complaint. In support of its Motion, InstallShield states as follows:

1. InstallShield filed its complaint against defendants Wise Solutions, Inc. ("Wise"),
on June 27, 2003. In that complaint, InstallShield seeks equitable and legal relief under the
Digital Millennium Copyright Act, 17 U.S.C. §§ 1201 *et seq.*, the Copyright Act of 1976, 17
U.S.C. §§ 301 *et seq.*, the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030 *et seq.*, and the
Illinois Trade Secrets Act, 765 ILCS 1065/1 *et seq.* based upon defendant Wise's long-term,
ongoing criminal conduct in using electronic espionage, on at least 903 occasions, to circumvent
computer password protections in order to acquire and use InstallShield confidential information
for unfair competitive purposes.

2. In its proposed First Amended Complaint, InstallShield seeks to add Brien
Witkowski and John McMillan as additional defendants. InstallShield's First Amended

Complaint alleges, in essence, that both Witkowski and McMillan participated in, directed, and authorized the activities undertaken by Wise to systematically hack into InstallShield's ftp server, defeat InstallShield's security precautions, and misappropriate InstallShield's trade secrets, copyrighted works, and other confidential business information stored on that server, in violation of the Computer Fraud and Abuse Act, the Illinois Trade Secrets Act the Digital Millennium Copyright Act, and the Copyright Act. A copy of InstallShield's proposed First Amended Complaint is attached as *Exhibit 1*. Each Exhibit to InstallShield's First Amended Complaint is identical to the Exhibits to InstallShield's initial complaint.

4. InstallShield brings these allegations against Witkowski and McMillan because several of the electronic documents produced by Wise on December 1, 2003 (consisting of more than 5,000 separate files taking up more than 6 gigabytes of storage space) substantiate the involvement by Wise management, including Brien Witkowski, Wise's President and co-owner, and John McMillan, Wise's CEO and co-owner, in the events alleged in InstallShield's initial complaint. These documents – all of which were designated as “Confidential Attorneys’ Eyes Only” under the agreed protective order – have enabled InstallShield to obtain a more complete picture of Witkowski's and McMillan's involvement in Wise's wrongful conduct.

5. Moreover, other documents produced by Wise that were also designated as either “Confidential” or “Confidential Attorneys’ Eyes Only” under the agreed protective order indicate that (1) Wise internally disseminated within Wise's organization InstallShield's trade secrets and other confidential information and (2) that Witkowski actively participated in this activity. The proposed First Amended Complaint alleges in Paragraph 63 that on Friday, August 16, 2002, for example, Witkowski sent a serial number for InstallShield's beta software to another individual within Wise's organization. That same paragraph alleges that on September

11, 2002, Witkowski sent a message to another individual within Wise's organization that indicates that he had copied InstallShield's beta software to a directory on one of Wise's internal computers or servers.

6. After a responsive pleading has been served, a party may amend its pleading with leave of court, and such leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). *See also Doherty v. Davy Songer, Inc.*, 195 F.3d 919, 928 (7th Cir. 1999). Here, the granting of InstallShield's motion for leave to amend will not prejudice Wise, since no depositions have yet been taken, and the additional parties whom InstallShield seeks to add are well aware of this litigation. Moreover, neither Witkowski nor McMillan are strangers to this case, as both were co-owners of Wise at the time that the litigation was commenced and both have been identified by Wise in its supplemental Rule 26(a)(1) disclosures.

7. This motion is not being interposed for any improper purpose.

WHEREFORE, Plaintiff, INSTALLATION SOFTWARE TECHNOLOGIES, INC., d/b/a INSTALLSHIELD SOFTWARE CORPORATION respectfully prays that this Court enter an order granting it leave to file its First Amended Complaint, *instantly*.

Dated: December 8, 2003.

Respectfully submitted,



One of the Attorneys for Plaintiff,
INSTALLATION SOFTWARE
TECHNOLOGIES, INC. d/b/a
INSTALLSHIELD SOFTWARE
CORPORATION

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**SEE CASE
FILE FOR
EXHIBITS**